**BINTULU REALTY ESTATE SDN. BHD.**

**v.**

**SAMAT BIN HJ. OTHMAN**

HIGH COURT, MIRI
TUAN RICHARD MALANJUM J.
[BANKRUPTCY NO. MR. 166/92]
18 OCTOBER 1993

***BANKRUPTCY: Petition by creditor - Whether there was sufficient cause not to make an order - Petition based on default judgment - Irregularity in default judgment - Order 42 r. 12 Rules of the High Court - No application to correct it - Whether petition could be dismissed - Irregular judgment - Whether bankruptcy notice could be founded on it - The circumstances of the case - Whether Court could go behind the judgment and inquire into its validity - Whether there was miscarriage of justice - Whether bankruptcy petition properly before the Court - Indivisibility of judgment - Whether judgment enforceable.***

The judgment creditor in this case had obtained a judgment in default of appearance against the judgment debtor on 6 November 1989. On a bankruptcy petition being presented by the petitioning creditor, it was submitted by the official assignee, that the claim for interest was not in order as it started from 1986 while the judgment was obtained only in 1989.

**Held:**

There was sufficient cause not to make any order.

**[1]** The default judgment was irregular. It offended O. 42 r. 12 of the Rules of the High Court 1980. It purported to include interest from 24 June 1986 while the judgment was obtained only on 6 November 1989.

However, though it was irregular, it could not be set aside as there was no application by the judgment debtor to do so.

**[2]** Nevertheless, the default judgment was a wrong judgment and there being no application to correct it, no further proceeding including the issuance of a bankruptcy notice should be founded on it.

A bankruptcy Court is not absolutely prohibited from going behind a judgment debt upon which a bankruptcy notice and subsequently a bankruptcy petition are founded. Where a judgment is wrong, it should not be allowed to be the basis of any further proceeding unless rectified before-hand by the holding creditor. The judgment in question must be irregular or wrong upon scrutiny.

**[3]** Further or in the event the Court was wrong, on a consideration of the circumstances of the case:

a. As there was a miscarriage of justice, the Court was also justified in going behind the judgment and to inquire into its validity.
b. As the judgment was indivisible, the bankruptcy petition could not be held to be properly before the Court.

The judgment was irregular, and a portion of it was unenforceable in bankruptcy as it was not payable in the first place. On the basis a judgment is indivisible unless a proper application is made to the Court, the present judgment was unenforceable and as such no bankruptcy notice could be founded upon it.

*[Petition dismissed with costs].*

**Cases referred to:**

*Ang Chee Seng v. Tan Khee Swee [1935] MLJ 245* ***(refd)***
*Hughes v. Justin [1894] 1 QB 667* ***(refd)***
*Datuk Lim Kheng Kim v. Malayan Banking Bhd. [1993] 3 CLJ 324* ***(refd)***
*Re Lennox [1885] 16 QBD 315* ***(refd)***
*Re Flatau; Ex parte Scotch Whisky Distillers Ltd. [1888] 22 QBD 83* ***(refd)***
*Re Fraser, Ex parte Central Bank of London [1892] 2 QB 633* ***(refd)***
*Re Hawkins, Ex parte Troup [1895] 1 QB 404* ***(refd)***
*Re A Debtor (No. 21 of 1937), The Debtor v. The Petitioning Creditor and the Official Receiver [1938] 2 All ER 824* ***(refd)***
*Muir v. Jenks [1913] 2 KB 412* ***(refd)***
*Malayan Banking Bhd. v. Datuk Lim Kheng Khim [1992] 3 CLJ 1449 / [1992] 2 MLJ 540* ***(refd)***
*Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee [1988] 1 CLJ 155 / [1988] 1 MLJ 304* ***(refd)***
*Tan Sin Moh v. Lebel Ltd. [1988] 2 MLJ 51* ***(refd)***

**Legislation referred to:**

Bankruptcy Act 1967, s. 6(3)
Rules of the High Court 1980, O. 42 r. 12
Bankruptcy Act 1883, s. 7(3) (UK)
The Law Reform (Married Women and Tortfeasor) Act 1935, s. 4(1)(c) (UK)

*For the judgment creditor - Vincent Lu; M/s. Khoo & Co.*
*For the judgment debtor - Andrew Kaya*
*For the official assignee - Dayang Nilhaidah*

**JUDGMENT**

**Richard Malanjum J:**

On 9 August 1993 I dismissed with costs the bankruptcy petition of the petitioning creditor on the primary basis that the bankruptcy notice was not in order and the bankruptcy petition was therefore not properly before the Court. The official assignee had earlier on submitted that the claim for interest was not in order as it started from 1986 while the judgment was only obtained in 1989. I have said that I will give my full grounds of decision if required and I do so now.

The judgment creditor obtained a judgment in default of appearance against the judgment debtor on 6 November 1989. The said judgment reads as follows:

> No Appearance having been entered by the defendant herein, It Is This Day Adjudged that the defendant do pay the plaintiff RM307,600 (Ringgit Three Hundred Seven Thousand And Six Hundred Only) with interest thereon at the rate of 8% per annum from 24 June 1986 till date of full and final settlement and RM225 (Ringgit Two Hundred And Twenty-five Only) costs.
> Dated this 6 November 1989.

There was nothing to indicate in the said judgment that the interest of 8% per annum was an agreed rate of interest and nothing was said about it by learned Counsel for the judgment creditor. Accordingly, I can only say that such a rate must have been based on O. 42 r. 12 of the Rules of the High Court 1980.

Order 42 r. 12 reads:

> Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs (unless the rate has been otherwise agreed upon between the parties), such interest to be calculated **from the date of judgment** until the judgment is satisfied.
> (emphasis is mine).

But the said judgment in this case purported to include interest from 24 June 1986 while the judgment was obtained only on 6 November 1989. Thus, in my view the said judgment, especially when it is a default judgment, offends the said O. 42 r. 12 and is therefore irregular. It is a settled law that a defendant is entitled *ex debito justitiae* to have an irregular judgment set aside. [See: *Ang Chee Seng v. Tan Khee Swee* [1935] MLJ 245; *Hughes v. Justin* [1894] 1 QB 667].

But in this case there is no question of setting aside as there is no application by the judgment debtor. Although there was an attempt to oppose the bankruptcy petition I had earlier on dismissed the application as it was irregular. [See: *Datuk Lim Kheng Kim v. Malayan Banking Bhd.* [1993] 3 CLJ 324.

Nevertheless a Bankruptcy Court is not absolutely prohibited from going behind a judgment debt upon which a bankruptcy notice and subsequently a bankruptcy petition are founded.

In *ex parte Lennox, In re Lennox* [1885] 16 QBD 315 it was held that a Bankruptcy Court has power to go behind a judgment and inquire into the consideration for the judgment debt at the instance of the trustee in the bankruptcy of the debtor upon the question of the proof of the debt or of the judgment debtor himself upon the hearing of a petition by the judgment creditor for a receiving order. This is what Lord Esher MR had to say in that case, at p. 321:

> Now, the authority of the Court, as I have already said, depends upon s. 7 of the Act, subsection 3 of which limits the authority in this way: "If the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition." Now, what proof is offered of the petitioning creditor's debt? No doubt there is the judgment. But, if the Court is not satisfied with that proof, which is the proof offered to it, "the Court may dismiss the petition." Then again, "if the Court is satisfied that for other sufficient cause no order ought to be made, the Court may dismiss the petition." It is argued that, notwithstanding these words, the Court at this stage of the proceedings ought to be and must be satisfied with the proof of the debt, if it is founded on a judgment obtained by consent. It is admitted that, if the judgment has gone by default, the Court might not, perhaps, under those circumstances, be satisfied with the judgment as proof. But it was strongly urged that where the judgment had been obtained by the consent of the alleged debtor, the Court must be satisfied with the proof.

Further down at p. 323, his Lordship continued:

> It cannot be doubted that a judgment is *prima facie* evidence of a debt, and that a

> judgment or order to which a debtor has consented is far stronger evidence against him of the validity of the debt for which it purports to be given than a mere judgment by default. It is very strong evidence against him. Nevertheless, it seems to me that, upon certain allegations being brought forward, the Court is entitled to inquire into the alleged debt, and the Court, exercising a judicial authority, is bound to do so upon a sufficient case being shewn. Circumstances may be alleged which would shew that the judgment ought to be disregarded in bankruptcy.

As regards to the power of a Bankruptcy Court his Lordship in the same case said this at p. 324:

> I think the hands of the Bankruptcy Court are not thus tied by such a consent of the debtor, and the Court is not to be made an instrument to act upon an alleged debt, where in truth and in fact there never was a debt at all.

Subsequently, in *Re Flatau; Ex parte Scotch Whisky Distillers Ltd.* [1888] 22 QBD 83 Lord Esher MR also said this at p. 85:

> It is not necessary now to repeat that, when an issue has been determined in any other Court, if evidence is brought before the Court of Bankruptcy of circumstances tending to shew that there has been fraud, or collusion, or miscarriage of justice, the Court of Bankruptcy has power to go behind the judgment and to inquire into the validity of the debt. But that the Court of Bankruptcy is bound in every case as a matter of course to go behind a judgment is a preposterous proposition. There is no statute which imposes any such obligation on the Court of Bankruptcy; s. 7 does no more than give a judicial discretion.

Section 7(3) of the English Bankruptcy Act 1883 is in *pari materia* with s. 6(3) of our Bankruptcy Act 1967.

And in the same case Fry LJ at p. 86 said this:

> It is true that in some cases the Court of Bankruptcy has gone behind a judgment, when it has been obtained by fraud, collusion, or mistake. But this power has never, so far as I am aware, been extended to cases in which a judgment has been obtained after issues have been tried out before a Court. I entirely agree with what was said by the Master of Rolls *In re Saville*(1):
>
> > It seems to me that the case of *Ex parte Lennox* (2) shews, that the mere fact of a judgment having been recovered does not prevent the Court of Bankruptcy, if sufficient reasons are given for doing so, from going behind the judgment.
>
> But it does not decide that, there being a judgment, on the mere suggestion of the debtor that the judgment is bad, the Court of Bankruptcy is bound to go behind the judgment and inquire into the validity of the debt.

In *Re Fraser, Ex parte Central Bank of London* [1892] 2 QB 633 the headnote reads:

> Upon the hearing of a creditor's petition for a receiving order against a judgment debtor, the Court of Bankruptcy has power, at the instance of the debtor himself, to go behind the judgment and to inquire into the validity of the debt, even though the debtor has previously applied in the action to set aside the judgment, and his application has been refused, and the refusal is affirmed by the Court of Appeal.

Again it was Lord Esher MR who in that case said this at p. 636:

> The Court of Bankruptcy can go behind the judgment, and can inquire whether, notwithstanding the judgment, there was a good debt. In so doing, the Court of Bankruptcy does not set aside the judgment. If I may use the expression, the Court goes round the judgment, and inquires into the subject-matter.

Further down his Lordship went on to say:

> The existence of the judgment is no doubt *prima facie* evidence of a debt; but still the Court of Bankruptcy is entitled to inquire whether there really is a debt due to the petitioning creditor.

In *Re Hawkins, Ex parte Troup* [1895] 1 QB 404 the judgment under scrutiny was a judgment obtained by compromise yet the Court of Appeal in a majority judgment went behind it in considering whether or not to grant the application for receiving order. The Court dismissed the application.

In that case it was also Lord Esher MR who said this at p. 408:

> This Court has now been sitting for a long time to administer the law under the Bankruptcy Act of 1883, and we have several times said (thinking that we were bound by the earlier decisions of James and Mellish LJJ to say it), that where the debt relied on in the Court of Bankruptcy is founded on a judgment obtained against a debtor, the Court is not bound by that judgment, although it is and must be binding between the parties for any other purpose. We have said that the Court will go behind the judgment, and I

think the cases shew that the Court will go behind a judgment by consent. I am also of opinion that a judgment obtained by a compromise does not of itself stop the Court from going behind it. We have tried to say that the Court will go into the whole transaction, because the question is not one of a dispute between the two parties; it is a matter which will affect and materially affect, the rights of all the creditors who were not before the Court when it has to determine whether a receiving order should or should not be made, which will or may result in the debtor being made a bankrupt. The Court will go into the whole matter, and see whether upon the whole it is fair to the whole body of creditors that the man, on the particular transaction between himself and the petitioning creditor, should have a receiving order made against him. In the same way, when a creditor comes to prove in bankruptcy the Court will go behind the judgment, and inquire into the whole transaction which preceded it. To make a man a bankrupt is obviously a strong interference with the rights of the general body of his creditors. Each creditor is materially affected to the extent that he cannot by his own diligence get the whole of his debt. From the moment of bankruptcy, though he be the most diligent of the creditors, he has to go into equal competition with the most idle. We have, therefore, gone so far as to say that when the whole body of creditors are foolish - when they are ready to agree to things to which, in the opinion of the Court, they ought not to agree - the Court will set that agreement aside. It is the Court which is called upon to act and to administer the estate, and the Court will not take that responsibility upon itself unless it sees that the whole transaction is fair as between all the creditors. Where a judgment has been obtained by a compromise, the Court has to say, looking at that compromise and all the facts which led up to it, whether in their opinion it is a just and proper compromise. In one case I know it was said that the Court would go behind a judgment obtained by a compromise, and consider that compromise as one of the facts in the case.

His Lordship Lopes LJ in the same case at p. 411 also said:

> It is clear, therefore, that the registrar is entitled to go behind the judgment and inquire, notwithstanding the judgment, whether there is a good debt - and this at the instance of the debtor himself, and though the judgment itself cannot be set aside.

Further down at p. 412, his Lordship continued to say this:

> It is, therefore, I am of opinion, clear that the Court of Bankruptcy is not bound by a judgment at law, but is entitled to investigate all the facts of the case whenever, but not before, a *prima facie* case impeaching the judgment is made out. Otherwise a man might defeat all his just creditors by allowing judgment to be taken by default or consent. The principle appears to be that it would be unjust and impolitic to allow a man to be subjected to the pains and penalties of bankruptcy unless it was established that there were grounds for so doing by the existence of a good petitioning creditor's debt, and unjust to the general body of creditors to permit one creditor, by means of a judgment which had no solid foundation, to obtain an undue advantage over them, and obtain payment of his alleged debt in full to their prejudice. It is said, however, that although that may be true with regard to an ordinary judgment, a judgment founded upon a compromise by the parties is a different thing, and ought not to be subjected to the same investigation as may be applied to a judgment not so circumstanced. Now, I see no distinction. In my judgment, both an ordinary judgment and one obtained by compromise may be inquired into directly, but not before, it is made out that either the one or the other has been improperly or unfairly obtained. I do not go to the length of saying that it must have been fraudulently obtained; it is sufficient, in my opinion, if it is made out that the judgment was improperly or unfairly obtained.

Also in *Re A Doptor (No. 21 of 1937), The Debtor v. The Petitioning Creditor and the Official Receiver* [1938] 2 All ER 824 his Lordship Sir Wilfrid Greene MR when dealing with the same principle of law at p. 827 C said this:

> It is common to find cases where, a bankruptcy notice having been issued in proper form following the language of the judgment, when the petition is presented, the Court will scrutinise the debt on which the judgment was based, and it may go behind the judgment, in the sense that it may find that that debt is one which, in whole or in part, would not be a good debt for the purposes of bankruptcy proceedings.

The headnote of *Re A Debtor's* case reads as follows:

> The debtor incurred a debt of £77 5 s. to the petitioning creditor, of which £5 5s. was incurred before 2 August 1935, the date of the coming into operation of the Law Reform (Married Women and Tortfeasor) Act 1935. £4 was paid in respect of the debt, and the petitioning creditor then sued for the balance and obtained a judgment for £78 18s. 6d., debt and costs, which was drawn up in the form

applicable to a contract entered into after 2 August 1935. The petitioning creditor then obtained the issue of a bankruptcy notice in respect of the whole amount of the judgment. That notice was not complied with and a petition was duly presented:

Held: (i) the issue of the bankruptcy notice was a step in the enforcement of the judgment in bankruptcy, and, the judgment being one which, by virtue of the inclusion in it of a debt incurred before 2 August 1935, could not be enforced in bankruptcy, the bankruptcy notice was a nullity *ab initio* and no petition could be founded upon it.

The Court of Appeal was also of the view that:

(i) the bankruptcy notice was an enforcement in bankruptcy of the debt and that the bankruptcy notice, which was bad as a whole, could not be made good by cutting away part of the judgment upon which it was based; and
(ii) as the judgment was indivisible, if any part of it was unenforceable in bankruptcy, then the whole was unenforceable, and no bankruptcy notice could be issued in respect of it.

It is significant to note that in *Re A Debtor's* case the judgment obtained consisted of a sum which should not have been included if it was to be enforced. And having included that objectionable sum in the judgment upon which the bankruptcy notice was founded, the validity of the bankruptcy notice itself was affected. Of course in that case there was a clear statutory prohibition on the enforcement of such type of judgment. [See: The Law Reform (Married Women and Tortfeasor) Act 1935, s. 4 (1)(c)].

However, the case of *Muir v. Jenks* [1913] 2 KB 412 is another case which deals with the issue in question. In that case the plaintiff had obtained a default judgment of £328 16s 17d and £4 14s costs without giving any credit to an earlier payment by the defendant of the sum of £20. However when the bankruptcy notice was issued the £20 was taken into account. Meanwhile, the defendant applied for the judgment to be set aside. The application was dismissed by the Court of the first instance on the ground of delay. But the point on the relationship between the judgment and the bankruptcy notice was discussed. Since the bankruptcy notice gave the correct sum outstanding the Court did not therefore decide on it. On appeal to the Court of Appeal his Lordship Buckley LJ in allowing the appeal said this at p. 415:

> Both the Master and the Judge appear to have thought that the debtor himself ought to have taken steps to get the judgment corrected and that for default in so doing he was now precluded by delay from having the judgment set aside. In my opinion that is wrong. It is the duty of the creditor if he obtains a wrong judgment to have it set right. It is not the duty of the debtor against whom he has obtained the judgment to do so. The question therefore does not turn upon delay by the debtor. The position is this. Here is a judgment which is wrong. The person who holds it has not sought to set it right, on the contrary he has said that there was no good in doing so. Under these circumstances the bankruptcy notice is founded upon a wrong judgment.

Further down at p. 417, his Lordship went on to say this:

> In the present case the party holding the judgment has never availed himself of that right to bring it down to a proper sum. He has issued a bankruptcy notice upon the footing that the judgment is right, and at the same time by giving credit in the bankruptcy notice for 201., which was paid before the judgment was signed, he has, on the face of the notice itself, affirmed that the judgment was wrong.

And his Lordship Kennedy LJ in the same case at p. 418 also said this:

> At the same time it is important that we should see that claims which are based upon a judgment signed for an excessive amount are not allowed to succeed when the course which has been deliberately taken by the creditor has prevented that amendment for the correction of the error which might have been made, in my view, in accordance with the rules and the authorities.

My reading of the above case is that it is the view of the Court that where a judgment is wrong, it should not be allowed to be the basis of any further proceeding unless rectified before-hand by the holding creditor. It should also be obvious that the judgment in question must be irregular or wrong upon scrutiny.

This issue of the relationship between an irregular judgment and bankruptcy proceeding was considered in our Court in the case of *Malayan Banking Bhd. v. Datuk Lim Kheng Khim* [1992] 2 MLJ 540. As this issue was not addressed to on appeal to the Supreme Court (though it was

stated by their Lordships that they had no reason to disagree with the decision of the High Court) I would therefore only consider the judgment of the High Court.

In concluding that the mistake in the judgment was not a sufficient reason to hold that the whole judgment could not be used to found bankruptcy proceedings, the learned Judicial Commissioner (as he then was) relied on the circumstances of that case, *inter alia*:

(a) the judgment in question was confirmed by the highest Court of this country;
(b) no challenge to the judgment sum except on the rate of interest; and
(c) the greater miscarriage of justice and the defeat of the ends of justice if he were to rule that the judgment, which had been confirmed by the Supreme Court, could not be used to found bankruptcy proceedings just because the interest after judgment awarded was more than it should be.

But at the same time the Court was of the view that the inclusion of a rate of interest higher than permitted by law amounted to a 'miscarriage of justice' as the judgment debtor had to pay more in the form of interest after judgment than what was allowed by law. [See: *Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee* [1988] 1 MLJ 304; *Tan Sin Moh v. Lebel Ltd.* [1988] 2 MLJ 51].

For the present case in the light of the authorities discussed above I think it can be best approached in this way, namely,

(i) as I find the default judgment irregular and therefore a wrong judgment and there being no application to correct it, no further proceeding including the issuance of a bankruptcy notice should be founded on it. Otherwise such notice would be held to be void *ab initio* and any subsequent proceeding based on the said notice would be an exercise in futility. [See: *Muir v. Jenks (supra)*];
(ii) Further or in the event that I am wrong in (1) above, I should consider the circumstances of this case. First, the judgment here is only a default judgment and due to its irregularity the defendant is entitled *ex debito justitiae* to have it set aside; secondly, there was in fact an attempt to challenge the judgment sum but failed for reason which I have stated earlier on in this judgment; thirdly, there is no greater miscarriage of justice and no defeat to the ends of justice as the judgment in question is only a default judgment unlike in the *Malayan Banking Bhd.'s* case where the judgment was confirmed by the highest Court of this country; fourthly, the imposition of interest before judgment amounts to a breach of a statutory provision, namely, O. 42 r. 12, Rules of the High Court 1980; and fifthly, to say that the difference in the amount between the actual sum due and the judgment debt can be reduced later by the official assignee, with respect in my view, tantamounts to allowing a judgment to be divisible which should not be the case. [See: *Re A Debtor (No. 21 of 1937), The Debtor v. The Petitioning Creditor and the Official Receiver (supra)*]. Accordingly, I am of the opinion that as there is a miscarriage of justice in the present case this Bankruptcy Court is also justified to go behind the judgment and inquire into its validity. Upon perusal of the default judgment it is not in dispute that the said judgment is irregular. As such, following the reasoning in *Re A Debtor (No. 21 of 1937)*, a portion of the said judgment is unenforceable in bankruptcy as it is not payable in the first place. On the basis that a judgment is indivisible unless a proper application is made to the Court, the present default judgment is unenforceable and as such no bankruptcy notice can be founded upon it. It follows that the bankruptcy petition is not properly before this Bankruptcy Court.

I hold therefore that for the foregoing reasons I find that there is sufficient cause not to make any order but to dismiss the petition with costs.

***Reported by Shamsiah Begum Subhan***